Filed 9/29/16 In re Joseph A. CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re Joseph A. et al., Persons Coming Under the Juvenile Court Law.	B269804 (Los Angeles County Super. Ct. No. CK98563)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. JOSEPH A., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County. Steff R. Padilla, Commissioner. Affirmed.

Valerie N. Lankford, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Acting Assistant County Counsel, and Julia Roberson, Deputy County Counsel, for Plaintiff and Respondent.

No appearance for Minors.

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The juvenile court terminated the parental rights of Amanda R. (mother) and Joseph A. (father) over the three children they had together. Father appeals this ruling, challenging the juvenile court's findings that the children were adoptable and that the children's relationship with their older half brother did not satisfy the "sibling bond" exception. We conclude there was no error, and affirm.

FACTS AND PROCEDURAL BACKGROUND

Mother and father have three children together: Joseph (born 2008), Priscilla (born 2009), and Carly (born 2011). Mother has three other children with another man—Vincent (born 1999), P. (born 2004), and Angelina (born 2005).[1]

In January 2013, the Los Angeles County Department of Children and Family Services (Department) filed a petition asking the juvenile court to exert dependency jurisdiction over all six children on the ground that mother's methamphetamine abuse rendered her incapable of providing them regular care, in violation of Welfare and Institutions Code section 300, subdivision (b).[2] In April 2013, the juvenile court sustained the petition, but released all six children to mother under the Department's supervision and on the conditions that mother submit to random drug testing and participate in substance abuse and parental counseling.

In September 2013, the Department filed a supplemental petition alleging the mother had tested positive for methamphetamines. That same day, the juvenile court removed the children from mother, placing all six children with father's aunt and uncle (aunt and uncle). At the time, mother advised the Department that aunt and uncle were "great people" capable of providing the children a "good" home. Within a month, Vincent moved away to live with his older half brother because he did not feel comfortable living with aunt and uncle and had trouble complying with their rules.

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[1] Vincent, P. and Angelina are not part of this appeal because mother has not appealed and their father died while these proceedings were pending.

[2] All further statutory references are to the Welfare & Institutions Code unless otherwise indicated.

Mother subsequently admitted the new allegation, and the court ordered reunification services for mother and father.

In May 2014, the juvenile court held a six-month review hearing. By that time, father was in prison. Because mother had been a "no show" for several drug tests and was not participating in counseling, and because neither mother nor father were maintaining any contact with the children, the juvenile court terminated reunification services and set the matter for a permanency planning hearing. At that same hearing, the court ordered no contact between Priscilla and Vincent, after Priscilla reported that Vincent sexually abused her; the court vacated the no-contact order three months later.

In May, June and November 2015, the juvenile court conducted the permanency planning hearings. The Department submitted reports indicating that Joseph, Priscilla and Carly were in good physical health and had no developmental or emotional impediments; reporting that Joseph had many friends but occasionally "g[ot] into trouble"; and relaying that Joseph and Priscilla were attending therapy once a month, and Carly was to be assessed for speech therapy. The reports further indicated that Joseph, Priscilla and Carly had developed a "special and nurturing relationship" with aunt and uncle. At the hearings, Joseph and Priscilla testified that they each wanted to be adopted by aunt and uncle. (Carly did not testify due to her young age.) Because Vincent requested permission to intervene in the permanency planning hearing to establish that Joseph, Priscilla and Carly had a "sibling bond" with him that would preclude adoption, Vincent, Joseph and Priscilla testified to their relationship. This testimony indicated that Vincent visited his other siblings and half siblings once a month and talked with them on the phone once a week. Although Vincent testified that he is "sad" when he does not get to visit with his siblings and Joseph testified that he would be "sad or angry" if Vincent were no longer his "big brother," Priscilla testified that she did not miss Vincent when he was not around and both Joseph and Vincent testified that they believed the visits would continue even after adoption.

In December 2015, the juvenile court terminated mother's and father's parental rights as to all of the siblings but Vincent, placed Vincent into a legal guardianship with

his half brother, and declared that there was clear and convincing evidence that the remaining siblings and half siblings were adoptable. The court rejected father's and Vincent's argument that adoption was impermissible due to the siblings' close bond, finding that Joseph, Priscilla and Carly "see [Vincent] from time to time, and they wish to continue to do so," but that this bond did not outweigh the "comforts" and "permanence" that would come from adoption. The court also rejected, as "not . . . true," allegations made in a May 2015 letter from uncle's sister that (1) aunt had a brain tumor that caused seizures, memory loss, and "mean" and "verbally abusive" behavior, and (2) uncle had molested his sister when they were kids, which she just realized. The court found the letter's allegations to be yet another "desperate attempt to sabotage adoption."

Father filed a timely appeal. Mother did not.

DISCUSSION

In this appeal, father argues that the juvenile court erred in terminating his parental rights because (1) the court's finding that Joseph, Priscilla and Carly are "adoptable" is not supported by substantial evidence, and (2) termination of father's parental rights would "substantial[ly] interfere[] with" the children's "sibling relationship" with Vincent, which precludes the court from terminating those rights under section 366.26, subdivision (c)(1)(B)(v).[3] As discussed below, neither argument has merit.

I. Adoptability

After a juvenile court has determined that efforts at reunification have failed, it has several options going forward. (§ 366.26, subd. (b).) The preferred option is to terminate the parents' rights and place the dependent children up for adoption. (*Id.*, subd. (b)(1).) However, a juvenile court may do so only if it finds, "by [] clear and convincing [evidence], that it is likely the child will be adopted." (*Id.*, subd. (c)(1); see also *In re Zeth S.* (2003) 31 Cal.4th 396, 406 (*Zeth S.*) [requiring "clear and convincing evidence of

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[3] Although the juvenile court never formally declared father to be a presumed father, the Department and the juvenile court treated him as such and as a party in its reports. Under these circumstances, he has standing to raise these objections. (See *In re Baby Boy V.* (2006) 140 Cal.App.4th 1108, 1117.)

the likelihood that adoption will be realized within a reasonable time"].) We review a juvenile court's finding that a child is likely to be adopted for substantial evidence. (*In re B.D.* (2008) 159 Cal.App.4th 1218, 1232 (*B.D.*).) Our task is only to ask whether the record contains """evidence that is reasonable, credible and of solid value""" supporting the finding of adoptability, and do so while viewing the evidence in the light most favorable to that finding and drawing all reasonable inferences in favor of that finding. (*Patricia W. v. Superior Court* (2016) 244 Cal.App.4th 397, 419-420; *B.D.*, at p. 1231.) Although the Courts of Appeal are split on whether our substantial evidence review takes into account the clear and convincing burden of proof (compare *In re I.W.* (2009) 180 Cal.App.4th 1517, 1526 (*I.W.*) [we do not] with *In re Noe F.* (2013) 213 Cal.App.4th 358, 367 [we do]), we will assume for purposes of our analysis that we are to take it into account.

As the plain language of section 366.26, subdivision (c)(1) suggests, the juvenile court's focus is on the *likelihood* of adoption. Adoption of the children must be more than a possibility (*In re Jennilee T.* (1992) 3 Cal.App.4th 212, 223), but less than a certainty (§ 366.26, subd. (c)(1) ["[t]he fact that the child is not yet placed in a preadoptive home nor with a relative or foster family who is prepared to adopt the child, shall not constitute a basis for the court to conclude that it is not likely the child will be adopted"]; *In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649 (*Sarah M.*) ["it is not necessary that the minor already be in a potential adoptive home or that there be a proposed adoptive parent 'waiting in the wings'"]).

Informally, juvenile courts have approached the question of whether this likelihood exists by asking two questions: (1) is the child "generally adoptable?"; or (2) is the child "specifically adoptable?" Either type of adoptability suffices. (*In re A.A.* (2008) 167 Cal.App.4th 1292, 1313 (*A.A.*).)

A child is generally adoptable as long as his or her age, physical condition, emotional state, or developmental condition does not "make it difficult to find a person willing to adopt the minor." (*Sarah M.*, *supra*, 22 Cal.App.4th at p. 1649; *In re Marina S.* (2005) 132 Cal.App.4th 158, 165; *In re Asia L.* (2003) 107 Cal.App.4th 498, 510 (*Asia*

L.); cf. *In re Gregory A.* (2005) 126 Cal.App.4th 1554, 1562 ["[a] child's young age, good physical and emotional health, intellectual growth and ability to develop interpersonal relationships are all attributes indicating adoptability"].) The focus of this inquiry is on the "adoptability of a child as an individual." (*In re I.I.* (2008) 168 Cal.App.4th 857, 872 (*I.I.*); see also *Zeth S., supra*, 31 Cal.4th at p. 406 ["focus[] [is] on the minor"]; *A.A., supra*, 167 Cal.App.4th at p. 1311 [same].) If a child is found to be generally adoptable, "the availability of prospective adoptive parents" is "irrelevant" and there is no need for the court to inquire into the suitability of a particular placement. (*In re Carl R.* (2005) 128 Cal.App.4th 1051, 1061-1062 (*Carl R.*); *A.A.*, at p. 1313.)

If a child is not considered to be generally adoptable due to his or her "'age, poor physical health, physical disability, or emotional instability'" (*I.W., supra*, 180 Cal.App.4th at pp. 1526-1527), the juvenile court may nevertheless find the child to be "specifically" adoptable "because a prospective adoptive family has been identified as willing to adopt the child" (*Sarah M., supra*, 22 Cal.App.4th at p. 1650). Because the identified family's interest is what makes it likely that such a child will be adopted, the juvenile court evaluating "specific" adoptability looks to whether there are any "legal impediments" to the identified family's adoption, to the suitability of that family, and to the child's wishes vis-à-vis adoption by that family. (*Ibid.*; *In re Brandon T.* (2008) 164 Cal.App.4th 1400, 1410; *Carl R., supra*, 128 Cal.App.4th at p. 1061; *B.D., supra*, 159 Cal.App.4th at p. 1232.)

Father argues that the juvenile court's adoptability finding is not supported by substantial evidence because (1) the court's finding that Joseph, Priscilla and Carly were adoptable rested on a finding that they were *specifically* adoptable, and (2) the court erred in concluding that there were no "legal impediments" to adoption by aunt and uncle, particularly in light of the recent and uninvestigated allegations of aunt's mental instability and uncle's childhood molestation of his sister.

Father's argument lacks merit because the central premise of his argument—that the juvenile court's finding of adoptability turned on a finding that Joseph, Priscilla, and Carly were *specifically* adoptable—is incorrect. As support for that premise, father

points to the fact that the court noted aunt and uncle's interest in, and suitability for, adoption. But that fact is relevant to *general* adoptability as well because "a prospective adoptive parent's willingness to adopt generally indicates the minor is likely to be adopted within a reasonable time by either the prospective adoptive parent *or by some other family*." (*Sarah M., supra*, 22 Cal.App.4th at pp. 1649-1650.) What is more, the juvenile court's failure to specify which type of adoptability it relied upon is of no moment because express findings are not required. (*A.A., supra*, 167 Cal.App.4th at p. 1313.)

Most importantly, substantial evidence supports a finding that Joseph, Priscilla and Carly are generally adoptable. At the time the court made its finding, the children were all relatively young (ranging from four to seven years old); they were all in good physical and mental health; they were all proceeding apace developmentally; and Joseph and Priscilla were school aged and performing well in school. Indeed, the only issues identified by the Department were that Joseph occasionally got into trouble at school, that Joseph and Priscilla attended monthly therapy, and that Carly needed to be assessed for speech therapy. None of these conditions rise to the level of the type of impediments that prevent a child from being generally adoptable. (Cf. *In re Jeremy S.* (2001) 89 Cal.App.4th 514, 525 [neurological problems], overruled in part on other grounds by *Zeth S., supra*, 31 Cal.4th 396; *In re Valerie W.* (2008) 162 Cal.App.4th 1, 14-15 [genetic disorders]; *In re Jerome D.* (2000) 84 Cal.App.4th 1200, 1205 [prosthetic eye]; *I.W., supra*, 180 Cal.App.4th at p. 1525 [posttraumatic stress disorder]; *Asia L., supra*, 107 Cal.App.4th at pp. 510-512 [hyperactivity necessitating medication].) Further, the interest of aunt and uncle in adopting the children is, as noted above, evidence of their general adoptability. (*Sarah M., supra*, 22 Cal.App.4th at pp. 1649-1650.)

Critically, because there is substantial evidence that the children are generally adoptable, whether they are specifically adoptable—that is, whether aunt and uncle are suitable adoptive parents—does not matter. (*Carl R., supra*, 128 Cal.App.4th at pp. 1061-1062; *A.A., supra*, 167 Cal.App.4th at p. 1313.) There need not be any prospective adoptive family """waiting in the wings.""" (*In re R.C.* (2008) 169 Cal.App.4th 486,

491.) Thus, father's concerns about the suitability of aunt and uncle do not undermine the juvenile court's finding of adoptability.

Father levels one further challenge at our alternative analysis: He contends that all five children are part of a five-member sibling group and that their inclusion in such a group means that they are less likely to be adopted. For support, father cites *B.D.*, *supra*, 159 Cal.App.4th 1218 and section 366.26, subdivision (c)(3). Father's argument fails both factually and legally. It is factually without merit because the juvenile court never declared the children to be adoptable only as a sibling group. It is also legally without merit. Because the focus of the adoptability inquiry is, as noted above, on the "adoptability of a child as an individual" (*I.I.*, *supra*, 168 Cal.App.4th at p. 872), whether a child is part of a sibling group is not relevant to whether he or she is generally adoptable (*id.* at pp. 871-872 & fn. 3). Although *B.D.* contains language suggesting the contrary (*B.D.*, at p. 1233 [discussing sibling group of five in assessing whether the children in that case were generally and specifically adoptable]), *B.D.* was a case involving specific adoptability: Two of the children in that case had behavioral problems rising to the level of developmental delays, and a third had a major depressive disorder. (*Id*. at p. 1223; accord, *In re Jayson T.* (2002) 97 Cal.App.4th 75, 82-83 [two brothers both suffering from attachment disorders], disapproved on other grounds by *Zeth S.*, *supra*, 31 Cal.4th 396, 413-414.) Section 366.26, subdivision (c)(3) is also of no help to father. That subdivision states that a child may be found to be "difficult to place" due to "the child's membership in a sibling group," but it addresses a juvenile court's power to identify adoption as a goal and to delay the termination of parental rights for a 180-day period. (§ 366.26, subd. (c)(3).) By its plain language, it applies only *after* the court has found that "the child has a probability for adoption." (*Ibid.*; *I.I.*, at p. 872 [distinguishing section 366.26, subdivision (c)(3) on this basis].) It does not preclude such a finding in the first place.

II. Sibling Bond Exception

Even if a child is found to be adoptable, the juvenile court may not terminate a parent's rights if one of six statutorily enumerated exceptions applies. (§ 366.26, subd.

(c)(1)(B).) One of those exceptions is the sibling bond exception. (*Id.*, subd. (c)(1)(B)(v).) We review a juvenile court's factual findings underlying its determination that this exception does not apply for substantial evidence, and its weighing of competing factors for an abuse of discretion. (*In re D.O.* (2016) 247 Cal.App.4th 166, 174 (*D.O.*).)

In assessing whether the sibling bond exception applies, a juvenile court must first determine "'whether terminating parental rights would substantially interfere with the sibling relationship.'" (*D.O.*, *supra*, 247 Cal.App.4th at pp. 173-174; § 366.26, subd. (c)(1)(B)(v).) In assessing this threshold question, the court is to "consider[] the nature and extent of the [sibling] relationship," including the following factors, among others: (1) "whether the child was raised with the sibling in the same home"; and (2) "whether the child shared significant common experiences or has existing close and strong bonds with a sibling." (§ 366.26, subd. (c)(1)(B)(v).) If the court determines that the termination of parental rights will interfere with the sibling relationship, then the court must "'weigh the children's best interest in continuing that sibling relationship against the benefit the child would receive by the permanency of adoption.'" (*D.O.*, at pp. 173-174; § 366.26, subd. (c)(1)(B)(v) [directing juvenile court to consider "whether ongoing contact is in the child's best interest, including the child's long-term emotional interest, as compared to the benefit of legal permanence through adoption"].) Use of this exception "'will likely be rare,'" particularly when the children to be adopted are younger children "'whose needs for a competent, caring and stable parent are paramount.'" (*D.O.*, at p. 174; *In re Daisy D.* (2006) 144 Cal.App.4th 287, 293 (*Daisy D.*); *In re Valerie A.* (2007) 152 Cal.App.4th 987, 1014.) The parent seeking to avoid adoption bears the burden of proving the applicability of this exception by a preponderance of the evidence. (*Valerie A.*, at p. 998.)

Father argues that he carried this burden of proof and that substantial evidence does not support the juvenile court's finding that the sibling bond between Joseph, Priscilla and Carly on the one hand and Vincent on the other was outweighed by the stability and permanence of adoption by aunt and uncle. We disagree. To be sure, there was evidence that Vincent had some bond with his current siblings insofar as he visited

them once a month and called them once a week; Joseph also testified that he would be "sad" if the visits stopped. But there was evidence indicating that the bond between the siblings did not run deep: There was no evidence by either Joseph or Priscilla of shared common experiences with Vincent (which is not surprising, given that Joseph was five and Priscilla was four); Priscilla testified that she did not miss Vincent when he was not around; and Vincent was the one who voluntarily moved out of aunt and uncle's house (and thus out of the lives of his siblings and half siblings). Further, there was nothing to indicate that the monthly visits would stop if Joseph, Priscilla and Carly were adopted. What is more, there was uncontradicted evidence that Joseph and Priscilla had a close relationship with their aunt and uncle and wanted to be adopted by them. On the whole, there is substantial evidence to support the juvenile court's factual findings and its conclusion that the children's best interests lie with adoption notwithstanding their relationship with Vincent was not an abuse of discretion.

Father raises several arguments in response. He contends that *Vincent* has memories of spending time with Joseph, Priscilla and Carly. But this is irrelevant because the depth and breadth of the sibling bond is to be "evaluated from the perspective of the child who is being considered for adoption, *not* the perspective of that child's sibling[]." (*D.O.*, *supra*, 247 Cal.App.4th at p. 174, italics added; accord, *In re Celine R.* (2003) 31 Cal.4th 45, 54-55.) Father next asserts that the children's visitation with Vincent will stop once his parental rights are terminated and the children are adopted. But the evidence in the record is to the contrary, rendering father's prognostications speculative. (*D.O.*, at p. 176; *Daisy D.*, *supra*, 144 Cal.App.4th at p. 293.) Lastly, father points to the juvenile court's comment that this was a "not an easy case." But the court was referring to the overall case and to the challenges created by the family's difficult dynamic and their efforts to sabotage adoption. Even if we treated the court's comment as pertaining to the sibling bond exception, the fact that the court may have struggled in evaluating the facts and applying them to the law does not mean, without more, that the court abused its discretion. Thoughtful consideration is to be encouraged; it is not a grounds for reversal absent error.

DISPOSITION

The order of the juvenile court is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, P. J.
BOREN

_____, J.
ASHMANN-GERST